IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 552

KENNETH E. GRIGSBY, F. W. MARTINIK, F. J. FINLEY, L. W. BLANABARD, JAMES PITTY, MARVIN FOSTER, FRED POJE, K. CONNER, ALVIS RANDOLPH, FLOSSIE MARIPIN, B. E. GREENWOOD, NEAL SCOTT, HENRY F. DOYLE, ALBERT POJE, E. S. FABAC, PAUL PAINE, ELWOOD PHILLIPS, S. E. PHILLIPS, D. C. RICHARDS, ED. HAMEL, FRANK E. PRINGLE, and JAMES B. VAN FLEET, JR., *Petitioners*

v.

PAUL F. MITCHUM, Mayor of the City of Kansas City, Kansas; EARL B. SWARNER, Health and Finance Commissioner of the City of Kansas City, Kansas; JOSEPH P. REGAN, Street Commissioner of the City of Kansas City, Kansas; JOHN THEROFF, Chief of Police of the City of Kansas City, Kansas; and JOHN O. SLAUGHTER, Chief, License Department of the City of Kansas City, Kansas, *Respondents*

PETITIONERS' REPLY BRIEF

The principal virtue of respondents' brief in opposition is that it at least does not deny the petitioners' earlier statement of the issues arising in this case. It does, however, tend to obscure the significance of these issues by a discussion of respondents' answers on the merits.

The issue of paramount importance can be framed in several ways. It has to do, not with the ultimate objective of the Kansas City ordinance but, as we tried to make plain before, the methodology of the ordinance. The ordinance on its face purports to "regulate" pinball machines by imposition of a license tax. It is justified by the Kansas Supreme Court as an act calculated to suppress gambling activities associated with pinball machines. In actual operation, the ordinance (1) forbids a license for, *i.e.* outlaws, pinball machines whose owners have paid a $250 Federal stamp tax regardless of whether the pinball machines or their uses violate state anti-gambling law and (2) while it automatically forbids a license to owners of pinball machines who have paid the $250 tax, it does not deny a license to owners who, though legally obligated to pay the Federal tax, have failed to do so.

The ordinance thus condemns the legal and nonlegal pinball machines alike, without affording any opportunity for a property owner to prove that his machines do not run afoul of state anti-gambling law. The ordinance also discriminates in its impact as between those owners who obey and those who flout Federal law. These are novel issues of law and are submitted by petitioners to this Court as questions of substantial importance. Nothing said in the respondents' brief defeats these issues or renders them academic.

Respondents' chief reliance is upon the argument that, assuming the City *could* legally proscribe all pinball machines, regardless of their legality under applicable State law, it is immaterial that a victim of the actual ordinance has no opportunity to exculpate himself by proving that his machines are lawful. Like so

many legal arguments founded upon what a legislative body might have done rather than what it actually did, this one is altogether specious.. "If the City Commissioners," say respondents, "reasonably believed that pinball machines are inherently harmful or offensive . . . or that gambling is being conducted thereon, they could ban them altogether . . . ." (RB 3) But had the Commissioners promulgated such a hypothetical ordinance, they would have raised a question of substantive due process entirely different from the question of procedural due process raised in the case at bar. In the hypothesized situation it would be whether the avowed object of the legislation lay within the police power. In our case the due process issues center solely upon the relation between the means and the end of the ordinance actually passed.

Respondents forget that the Kansas Supreme Court has definitely construed the ordinance as being designed to suppress *gambling* on pinball machines. That being so, the anti-gambling purpose of the ordinance necessarily qualifies and limits the area of "reasonableness" wherein the ordinance may, consistently with due process, implement this purpose or object. Given its anti-gambling objective, we say there is no reasonable connection between means and end when the act automatically condemns both gambling and non-gambling pinball machines, deliberately foreclosing any opportunity for a distinction between the two. We also contend that the act unjustly and unreasonably discriminates between those who obey Federal law and those who do not.

Respondents, forget, too, that the ordinance must be appraised from a due process standpoint as it is written and designed, not as it might have been. Due

process, for example, does not compel a state to provide the machinery for appellate review of criminal prosecutions. But once it elects to do so, that machinery must be judged by the due process standards of reasonableness, just as any other purported exercise of the police power. *Griffin* v. *Illinois*, 351 U. S. 12. This principle is perfectly apposite here. Even assuming *arguendo* that a city might lawfully proscribe all pinball machines for any or no reason whatever, the City of Kansas City has chosen to enact a "regulatory" licensing statute aimed, according to the Kansas Supreme Court, at the inhibition of gambling activities. The ordinance must therefore be evaluated from a due process standpoint on these selfsame terms and in light of the avowed purposes of the legislation. Taking the ordinance as it is, petitioners contend that it fails to meet the test of due process. Its purpose being to suppress gambling, due process requires that its potential victims be allowed some procedural opportunity to disprove the act's imputation of illegal gambling activities to their own pinball machines. Likewise, there is no rational basis for the act's discrimination between pinball machines owners who pay the Federal tax and those who should but do not. There is just as much factual warrant for a suspicion of gambling on the latter's machines as upon those of the former. Hence, the favored treatment of those who defy Federal law is without reasonable foundation.

This last point, incidentally, is not denied by respondents but is the subject of considerable obfuscation. On page 5 of their brief they observe:

> "Certainly the governing body is equally concerned about the pinball operator who permits gambling on machines for which no current Fed-

eral stamp has been paid. *A license will be denied the non-Federal tax stamp holder by the City for proven gambling operation.*" (Emphasis supplied)

The first, and most important thing to note about the underscored language is that it dehors the record. It is an interpretation of the ordinance made by respondents rather than any judicial tribunal. They cite no authority for their interpretation. Petitioners are aware of no cases in which such a construction has been made. Certainly, no such adjudication was made in this case.

Furthermore, the language of the ordinance itself does not support respondents' conclusion. It is perhaps true that the Chief of Police, whose approval is a prerequisite for a license, might conclude from the existence of gambling activities conjoined with an applicant's failure to pay the $250 tax, that the applicant lacked the requisite "good moral character." But both the Kansas Supreme Court and respondents emphasize the purely "ministerial" character of the Chief's responsibilities in this regard. In any event, the respondents say the "non-Federal tax stamp holder's" gambling operation must be "*proven*" before he will be denied an operator's license. This puts the determination clearly beyond the competence of the Police Chief.

Unless they are relying upon Section 3, spelling out the Police Chief's duties of inspection, and the logically impossible theory just outlined, there is no conceivable basis in the language of the ordinance for the statement in respondents' brief. Indeed, the ordinance does not even require that an applicant disclose whether any gambling operations have been "proven" against him. Under these circumstances, how can respond-

ents justify their *ex cathedra* pronouncement quoted above? Not only are they masking their opinion as an established fact, but their opinion seems to be wrong on the merits. In any event, their statement that a license will be denied the "non-Federal tax stamp holder . . . for proven gambling operation," is sheer opinion and not an adjudicated fact. It naturally cannot be considered otherwise by this Court.

Even taking the opinion as correct, however, respondents' view of the ordinance does not traverse that of petitioners. Respondents simply say that, for some unspecified reason, the ordinance requires that a license be denied to an applicant who has not paid the Federal stamp tax for which he is liable, *if* he has been collaterally adjudged guilty of an actual "gambling" operation. Our point, of course, is that the ordinance discriminates between an applicant who has paid the tax and the applicant who, though liable for the tax, has refused to pay it. This is a discrimination between those who obey Federal law and those who do not. It has nothing to do with whether a person has violated State anti-gambling laws. The form of discrimination we speak of is unquestionably built into the ordinance and this is not denied by respondents in spite of the dubious construction of the ordinance unilaterally held by them and gratuitously put forward in their brief.

CONCLUSION

These considerations lead inexorably to the conclusion that the procedural operation of the Kansas City ordinance raises highly significant, and as yet unanswered, issues of Constitutional law. The issues have been properly argued and preserved and are ripe for

adjudication in the case at bar. We therefore respectfully pray that the writ of certiorari be granted.

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